

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT B. FERGUSON,

Defendant and Appellant.

C036911

(Super. Ct. No. 6213613)

APPEAL from a judgment of the Superior Court of Placer County. James L. Roeder, Judge. Affirmed.

Maureen J. Shanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Robert Ferguson pleaded no contest to a felony charge of possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) The trial court sentenced defendant

to three years in state prison, suspended the sentence, and committed defendant to the California Rehabilitation Center as a narcotics addict. (See Welf. & Inst. Code, § 3051.)

On appeal, defendant claims the trial court erred in denying a suppression motion filed pursuant to Penal Code section 1538.5. We disagree. Here, a police officer searched defendant in objectively reasonable, good faith reliance on erroneous information from the county probation department indicating defendant was on probation for a drug offense. Consistent with federal and state law, we conclude the exclusionary rule does not require exclusion of evidence derived from the search.

FACTS

In the early morning of February 26, 2000, Police Officer Mervin Screeton of the Roseville Police Department was on patrol when he observed a Ford Thunderbird with a broken windshield. Officer Screeton also noticed the front license plate was bent so that the numbers were obscured and the rear license plate light was lit but was not illuminating that plate. Officer Screeton pulled the car over.

Defendant was the driver and was traveling with one passenger. After radioing the dispatcher to check defendant's license and other information, Officer Screeton was advised that defendant was on probation for a violation of Health and Safety Code section 11378, possession for sale of a controlled substance. Officer Screeton understood from experience that

persons placed on probation for that offense were ordinarily subject to a search condition.

Although defendant claimed he was not on probation, Officer Screeton relied on the information from the dispatcher and conducted a search. Officer Screeton discovered methamphetamine on defendant's person and in the car. Because defendant continued to insist he was not on probation, Officer Screeton double-checked with the dispatcher. Again, the dispatcher advised Officer Screeton that defendant was on probation.

It was later discovered that defendant was not on probation at the time of the search. In 1996, defendant had been placed on probation for five years for a violation of Health and Safety Code section 11378, and defendant had been subject to a search condition. However, in 1998 his probation was terminated early, well before the traffic stop in this case. The source of the erroneous information indicating defendant was still on probation was the supervise release files (SRF) database, which is maintained by the California Department of Justice.

The county probation departments ordinarily enter information in the SRF concerning probation status. In this case, the Placer County Probation Department (the probation department) entered the information about defendant's probation. It was the probation department's responsibility to update the database after defendant's probation ended early, but the probation department failed to do so.

Kenneth Englund, the manager of the adult services division of Placer County Probation, believed that the failure to update

the database "was due to clerical error and an unawareness of the requirement for probation to input early terminations into the SRF file." The probation department has taken action to address the problem. Englund explained that the "administrative supervising clerk has taken upon [herself] the responsibility to become more familiar with the statutes and to train her clerks regarding their responsibilities in inputting the information into the SRF and then maintaining information and updates after that initial entry."

DISCUSSION

"Generally, in reviewing a determination on a motion to suppress, we defer to the trial court's factual findings which are supported by substantial evidence and independently determine whether the facts of the challenged search and seizure conform to the constitutional standard of reasonableness. [Citation.]" (*People v. Downing* (1995) 33 Cal.App.4th 1641, 1650.) If the facts are basically undisputed, as they are here, we independently review the trial court's legal decision. (*Ibid.*)

Here, Officer Screeton conducted a probation search in reliance on erroneous information indicating defendant was on probation for a drug offense. There is no dispute that the search was unreasonable under the Fourth Amendment. (See *People v. Downing, supra*, 33 Cal.App.4th at pp. 1650-1651.) The question is whether the constitutional violation is appropriately remedied by applying the exclusionary rule. (*Id.* at p. 1651.) Since the county probation department was

responsible for the error that resulted in the search, the trial court concluded that the exclusionary rule was inapplicable pursuant to *In re Arron C.* (1997) 59 Cal.App.4th 1365.

Defendant disputes the trial court's ruling and argues that the exclusionary rule should apply, primarily to deter county probation officials from intentional misconduct or negligence. Defendant relies heavily on *People v. Howard* (1984) 162 Cal.App.3d 8 (hereafter *Howard*), to support his argument.¹ In *Howard*, the court concluded that evidence derived from an unlawful probation search should be suppressed since a probation officer had improperly failed to advise police that defendant was subject to only a limited search condition. (*Howard*, at pp. 15, 21.)

Howard is not persuasive authority since it is factually distinguishable and is not grounded in current law. In *Howard*, the probation officer actively accompanied police during the search after volunteering to assist (*Howard, supra*, 162 Cal.App.3d at pp. 12, 19), and was therefore acting in a law enforcement capacity. Moreover, *Howard* predates *Arizona v. Evans* (1995) 514 U.S. 1 [131 L.Ed.2d 34] (hereafter *Evans*), and other important precedent, and it has also been criticized as

¹ Defendant also notes that there are two Court of Appeal cases with related issues pending before the California Supreme Court, and he complains about the People's failure to address one of these cases in briefing. Cases pending review before the state Supreme Court may not be cited as authority, and we are precluded from considering them. (Cal. Rules of Court, rules 976, 977.)

overly rigid. (*In re Arron C.*, *supra*, 59 Cal.App.4th at p. 1372; *People v. Downing*, *supra*, 33 Cal.App.4th at p. 1652, fn. 17.) Accordingly, we consider other relevant authority, beginning with the cases of the United States Supreme Court.

The Supreme Court has explained that the exclusionary rule is a judicially created remedy designed to deter law enforcement misconduct by prohibiting the admission at trial of evidence obtained in violation of the Fourth Amendment. (See *United States v. Leon* (1984) 468 U.S. 897, 906 [82 L.Ed.2d 677, 687-688] (hereafter *Leon*).) “[I]t cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.” (*Id.* at p. 919 [82 L.Ed.2d at p. 696].) In *Leon*, the court specifically held that the exclusionary rule does not apply to evidence discovered when police act “in objectively reasonable reliance on a subsequently invalidated search warrant.” (*Id.* at p. 922 [82 L.Ed.2d at p. 698].) In *Illinois v. Krull* (1987) 480 U.S. 340, 349-350 [94 L.Ed.2d 364, 375], the court held that the exclusionary rule does not apply when police act in objectively reasonable reliance on a statute later declared unconstitutional. In *Evans*, *supra*, 514 U.S. at p. 16 [131 L.Ed.2d at p. 47], the court held that “[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.”

Three primary factors underlie the court’s decisions. (*Evans*, *supra*, 514 U.S. at pp. 11, 14-15 [131 L.Ed.2d at pp. 44, 46-47]; *Illinois v. Krull*, *supra*, 480 U.S. at p. 348 [94 L.Ed.2d at p. 374] [explaining *Leon*, *supra*, 468 U.S. 897 [82 L.Ed.2d

677].) In *Evans*, the most analogous case to the instant case, the court applied the three factors as follows: "First, . . . the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees"; "[s]econd, [defendant] offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion"; and "[f]inally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." (*Evans, supra*, 514 U.S. at pp. 14-15 [131 L.Ed.2d at pp. 46-47].)

Applying the Supreme Court's reasoning, the First Appellate District held that the exclusionary rule was inapplicable where police searched defendant in reliance on information from the supervisor of a juvenile probation office. (*In re Arron C.*, *supra*, 59 Cal.App.4th at pp. 1370-1371.) In that case, as in the instant case, police were told defendant was subject to a search condition that was in fact no longer in effect. (*Ibid.*) We find *In re Arron C.* to be persuasive and similarly conclude, based on the three factors described by the Supreme Court, that the exclusionary rule is inapplicable here.

First, "the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by" clerical employees of the county probation department. (*Evans, supra*, 514 U.S. at p. 14 [131 L.Ed.2d at pp. 46-47].) "Since

the rule's primary purpose is to 'deter . . . unlawful police conduct' [citation], it is applied most commonly where a police officer conducts a search which violates a person's Fourth Amendment rights in some significant way." (*In re Arron C.*, *supra*, 59 Cal.App.4th at p. 1369.) The rule also applies "where a police officer conducts a search on the basis of faulty information from police sources. [Citation.]" (*Ibid.*, citing *People v. Ramirez* (1983) 34 Cal.3d 541, 552.) Here the police officer who searched defendant did not commit any misconduct, and the county probation department that was the source of the erroneous information is not itself a traditional police agency.

The police officer involved in the search, Officer Screeton, acted in objectively reasonable reliance on information indicating defendant was on probation. Although defendant asserts that the exclusionary rule applies where police act under a mistaken belief in the law, that is not the case here because Officer Screeton acted based on *factual* information that, if true, would have justified the search. Officer Screeton conducted what to all appearances was a lawful probation search, a recognized exception to the warrant requirement. (See *People v. Downing*, *supra*, 33 Cal.App.4th. at p. 1650.) Although Officer Screeton was not specifically informed defendant was subject to a search condition, Officer Screeton was aware of the underlying drug offense and reasonably concluded that a search condition would attach to the grant of probation. In fact, a search condition had been a part of defendant's probation.

Moreover, the facts do not give rise to an inference police knowingly relied on information they had reason to believe was flawed or unreliable. The source of the erroneous information indicating defendant was still on probation was the SRF, which had not been updated by the county probation department to reflect defendant's early release from probation. Nothing indicates county probation officials engaged in deliberate misconduct by failing to update the SRF. Rather, the failure to update the database was the apparent result of an inadvertent clerical error due to lack of awareness of the probation department's responsibilities.

The county probation department itself is not a traditional police agency. In Placer County, *the court* appoints the chief probation officer, who oversees the probation office. (Placer County Code, § 3.08.170,² citing Pen. Code, § 1203.6.) The probation department is thus more an arm of the court than a traditional police agency. (Cf. *In re Arron C.*, *supra*, 59 Cal.App.4th at p. 1371.) It is true the county probation department has some responsibilities that are similar to those of traditional law enforcement, and on occasion may cooperate with and assist police. (See generally Pen. Code, § 830.5.) But its primary role differs in important respects from traditional law enforcement. The probation department is responsible for supervising and assisting probationers.

² This provision was formerly codified in chapter 14 of the Placer County Code.

Accordingly, probation officials must have the probationers' welfare in mind. (Cf. *Griffin v. Wisconsin* (1987) 483 U.S. 868, 876 [97 L.Ed.2d 709, 719].)

For similar reasons, the second rationale for not applying the exclusionary rule also applies. Defendant has not shown the probation department's clerical employees "are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. [Citations.]" (*Evans, supra*, 514 U.S. at pp. 14-15 [131 L.Ed.2d at p. 47]; see also *In re Arron C., supra*, 59 Cal.App.4th at p. 1371.) To the contrary, the probation department has taken steps to prevent the kind of clerical error that occurred. This is not surprising given the probation department's obligation to the probationers it supervises. While defendant argues that there is a danger of collusion with police, there is simply no evidence of collusion in the record.

Finally, the third rationale for not applying the exclusionary rule, which the United States Supreme Court has characterized as "most important," also applies. (*Evans, supra*, 514 U.S. at p. 15 [131 L.Ed.2d at p. 47].) "[T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on" the clerical employees responsible for providing information on probationers to law enforcement. (*Ibid.*) As previously noted, probation officials act in a very different capacity than police and must have the probationers' welfare in mind. "Probation officers are not 'adjuncts to the law enforcement team.'" (*In re Arron C.,*

supra, 59 Cal.App.4th at p. 1371, quoting *Evans, supra*, 514 U.S. at p. 15 [131 L.Ed.2d at p. 47].) Given the role of the probation department, its employees do not ordinarily have a stake in the outcome of a particular criminal prosecution. (Cf. *ibid.*)

Probation supervision can be analogized to parole supervision. And the United States Supreme Court has emphasized factors suggesting there are diminished deterrence benefits in applying the exclusionary rule to parole officers, as opposed to police. In *Pennsylvania Board of Probation & Parole v. Scott* (1998) 524 U.S. 357, 369 [141 L.Ed.2d 344, 355] (*Pa. Bd. of Parole v. Scott*), the court held that it was unnecessary to apply the exclusionary rule to state parole revocation hearings. The court explained that "[e]ven when the officer performing the search is a parole officer, the deterrence benefits of the exclusionary rule remain limited." (*Id.* at p. 368 [141 L.Ed.2d at p. 355].) The court observed that unlike police, parole officers "are not 'engaged in the often competitive enterprise of ferreting out crime,' [citation]; instead, their primary concern is whether their parolees should remain free on parole. Thus, their relationship with parolees is more supervisory than adversarial. [Citation.]" (*Ibid.*) Given the parole officer's role, the court reasoned that it is "'unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer.'" (*Ibid.*, quoting

Morrissey v. Brewer (1972) 408 U.S. 471, 485-486 [33 L.Ed.2d 484, 497].)

Clerical employees of the county probation department, even more so than parole or probation officers, are removed from the often competitive enterprise of ferreting out crime. Under these circumstances, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on" the erroneous information entered by clerical employees of the probation department "cannot justify the substantial costs of exclusion." (*Leon, supra*, 468 U.S. at p. 922 [82 L.Ed.2d at p. 698].)

The result might be different if probation officials had participated in the search or otherwise initiated or encouraged it. (*In re Arron C., supra*, 59 Cal.App.4th at pp. 1372-1373.) If probation officials were actively involved in the search, the exclusionary rule might better serve the aim of deterrence because the probation officials would actually be acting as adjuncts to law enforcement. (*Ibid.*; see also *Pa. Bd. of Parole v. Scott, supra*, 524 U.S. at p. 369 [141 L.Ed.2d at p. 355].) However, here the probation department did not have an active role in the search.

We conclude the trial court properly denied defendant's motion to suppress.

DISPOSITION

The judgment is affirmed. (***CERTIFIED FOR PUBLICATION.***)

MORRISON, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.